Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Workplace Fairness: Has The Supreme Court Misinterpreted Laws Designed To Protect American Workers"
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This week, the United States Supreme Court met to officially begin its new term. We are here today at another hearing highlighting how decisions of the Supreme Court affect the everyday lives of Americans.

Today's hearing will focus on how a bare majority of the Supreme Court has overridden statutory protections to make it more difficult to prove age discrimination in the workplace. In two narrowly divided 5-4 decisions, the majority of the Court threatens to eliminate more of Americans' civil rights in the workplace, just as it eliminated Lilly Ledbetter's claim to equal pay, until Congress stepped in this year to set the law right.

Congress has worked to enact civil rights laws to eliminate discrimination in the workplace. In 1967, Congress passed the Age Discrimination and Employment Act with the intent to extend protections against workplace discrimination to older workers. We strengthened these protections in the Civil Rights Act of 1991, which passed in the Senate 93 to five.

The Supreme Court's recent decisions make it more difficult for victims of employment discrimination to seek relief in court, and more difficult for those victims who get their day in court to vindicate their rights. These decisions will encourage corporations to mistreat American workers in a still recovering economy. For anyone who doubts that there is conservative activism in our courts and the effects it is having, they need look no further than the decisions affecting two of our witnesses, Jamie Leigh Jones and Jack Gross.

The Supreme Court's misinterpretation of the Federal Arbitration Act in the Circuit City case threatens to undermine the effective enforcement of our civil rights laws. When Congress passed the arbitration act, it intended to provide sophisticated businesses an alternative venue to resolve their disputes. The arbitration act made arbitration agreements between businesses enforceable and directed courts to dismiss any claims governed by such agreements.

Congress never intended this law to become a hammer for corporations to use against their employees. But in Circuit City, the Supreme Court allowed for just that when it extended the

scope and force of the arbitration act by judicial fiat, so as to make employment contract arbitration provisions enforceable.

Now, after the Circuit City decision, employers are able to unilaterally strip employees of their civil rights by including arbitration clauses in every employment contract they draft. Countless large corporations have done so. Some have estimated that at least 30 million workers have unknowingly "waived" their constitutionally guaranteed right to have their civil rights claims resolved by a jury by accepting employment, which necessarily meant signing a contract that included such a clause in the fine print.

There is no rule of law in arbitration. There are no juries or independent judges in the arbitration industry. There is no appellate review. There is no transparency. And, as we will hear today from Jamie Leigh Jones, there is no justice.

Today we will also hear from Mr. Gross, whose case shows that for those employees who are able to pry open the courtroom doors, the Supreme Court has placed additional obstacles on the path to justice.

After spending 32 years working for an Iowa subsidiary of a major financial company, Mr. Gross was demoted, and his job duties were reassigned to a younger worker who was significantly less qualified. In his lawsuit under the Age Discrimination Act, a jury concluded that age had been a motivating factor in his demotion and awarded him nearly $50,000 in lost compensation.

A slim conservative majority of the Supreme Court, however, overturned the jury verdict and decided to rewrite the law. The five justices adopted a standard that the Supreme Court had itself rejected in a prior case and that Congress had rejected when enacting the Civil Rights Act of 1991. It is no wonder why Justice Stevens' dissent in Gross called the decision "an unabashed display of judicial lawmaking." It is the very definition of judicial activism when a court imposes a rule of decision rejected by its own precedent and rejected by Congress. Mr. Gross' justice was taken away when the Supreme Court decided that age discrimination had to be not only a motivating factor but the only factor.

I am concerned that the Gross decision will allow employers to discriminate on the basis of age with impunity so long as they cloak it with other reasons. As we will hear today from Mr. Gross, age discrimination too often victimizes workers who have dedicated decades of service to their employers. Older workers, who make up nearly 50 percent of the American workforce, are particularly vulnerable to discrimination during difficult economic times. In fact, age discrimination complaints filed with the Equal Employment Opportunity Commission (EEOC) jumped nearly 30 percent last year. I fear that in the wake of Gross few, if any, of these victims will achieve justice. And lower courts have been applying the rationale endorsed in the Gross case to weaken other anti-discrimination statutes, as well.

When President Obama signed the Lilly Ledbetter Fair Pay Restoration Act into law earlier this year, he reminded us of the real world impact of Supreme Court decisions on workplace rights. He said that "[economic] justice isn't about some abstract legal theory, or footnote in a casebook - it's about how our laws affect the daily realities of people's lives: their ability to make a living and care for their families and achieve their goals." He also reminded us that "making our

economy work means making sure it works for everyone."
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